

DATE: June 5, 1997

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0154

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR.**

**APPEARANCES**

**FOR THE GOVERNMENT**

Michael H. Leonard, Esquire

Department Counsel

**FOR THE APPLICANT**

Donna L. Crary, Esquire

**STATEMENT OF THE CASE**

On 12 February 1997, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 1 March 1997, Applicant answered the SOR and requested a hearing. DOHA assigned the case to a different Administrative Judge on 25 April 1997; that Judge issued a Notice of Hearing the same day. On 16 May 1997, I was assigned to hear the case because of scheduling conflicts. I held the hearing 20 May 1997.

At the hearing, the Government presented two exhibits--admitted without objection--and two witnesses; Applicant presented one exhibit--admitted without objection--and the testimony of two witnesses, including himself. I received the transcript on 3 June 1997.

A copy of the SOR is attached to this Determination and incorporated by reference.

**RULINGS ON PROCEDURE**

On 16 May 1997--during a conference call with Department Counsel and counsel for Applicant--counsel for Applicant requested a continuance on the ground that she had just recently been retained by Applicant to represent him in this proceeding, and needed time to prepare the case. The Government opposed the continuance on the ground that Applicant had known since 19 February 1997--the date he received the SOR--that he had a right to representation at this hearing, and further, that the Government had scheduled two witnesses for the hearing who would be difficult to reschedule. I denied the continuance on the grounds that Applicant had not acted with due diligence to obtain counsel,

and, consequently, had failed to establish good cause for the continuance.

### **FINDINGS OF FACT**

Applicant admitted the original allegations of the SOR, except for the allegations of paragraph 1.c.--that he used crack cocaine in 1994; paragraph 1.f.--that he used marijuana after a June 1996 sworn statement; and subparagraph 3.a.--alleging falsification under title 18; accordingly, I incorporate the admissions as findings of fact.

Applicant is a 40-year old employee of a defense contractor seeking a to retain a secret clearance.

On 5 June 1996, a Special Agent of the Defense Investigative Service (DIS) questioned Applicant about allegations of past drug use.<sup>(2)</sup> On 5 June 1996, Applicant executed a sworn statement detailing his drug abuse history (G.E.1).<sup>(3)</sup> He offered to undergo a polygraph examination to corroborate his claims.

On 18 December 1996, another DIS Special Agent--a polygrapher--interviewed Applicant in anticipation of a polygraph examination. During the interview, Applicant acknowledged that he provided false information about his drug use in his June 1996 sworn statement, and did so because he feared losing his job and security clearance. He disclosed the full extent of his drug involvement: he used marijuana about twice a year in social situations from 1975 to late June 1996;<sup>(4)</sup> he bought user amounts of marijuana two or three times in 1975; he tried hashish once in 1981 while in the military; he used crack cocaine once at a New Year's Eve party in 1994.<sup>(5)</sup> He reduced these admissions to a sworn statement executed 18 December 1996 (G.E. 2).<sup>(6)</sup>

Applicant knew drug use was against government and company policy when he used drugs after being granted a security clearance in 1984. He now states an intent to not use drugs in the future. He has a good employment record; his former--now retired--supervisor considers him to have been a good employee (A.E. A).

### **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

#### **DRUG INVOLVEMENT (CRITERION H)**

Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Conditions that could raise a security concern and may be disqualifying include:

- (1) any drug abuse;
- (2) illegal drug possession, including . . . purchase, sale . . .

Conditions that could mitigate security concerns include:

- (1) the drug involvement was not recent.

#### **PERSONAL CONDUCT (CRITERION E)**

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include:

(3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

Conditions that could mitigate security concerns include:

None.

### **CRIMINAL CONDUCT (CRITERION J)**

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

(1) any criminal conduct, regardless of whether the person was formally charged;

Conditions that could mitigate security concerns include:

None.

### **Burden of Proof**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

### **CONCLUSIONS**

The Government has established its case under criterion H. Applicant's use of hash and crack cocaine, and his purchases of marijuana are sufficiently distant and infrequent to conclude that Applicant is unlikely to engage in that conduct in the future. His use of marijuana, however, presents a different issue. Although Applicant used marijuana infrequently--and there is no evidence to suggest any dependence issues--Applicant used marijuana consistently from 1975 to 1996 without regard to its legality and from 1984--the date he received his clearance--in disregard of known prohibitions by the Government and his employer. Consequently, I find Applicant's stated intent to refrain from marijuana use not credible; I conclude he may continue to use it in the future. Accordingly, I find Criterion H. against Applicant.

The Government has established its case under Criteria E. The information sought by the Government during the subject interview was relevant and material to the Government's investigation of the Applicant's fitness for access to classified information, and the Applicant knowingly and wilfully falsified that information. The Applicant's failure to fully disclose his drug abuse history until he was confronted with a polygraph examination, suggests that he cannot be relied upon to speak the truth if the truth presents possible adverse consequences for his own interests. He knew the answers he provided were false; and indeed he knew the answers had to be false for him to protect his interests--in his job and security clearance. At no time before the polygraph interview did Applicant make any effort to fully disclose his drug

abuse history, much less a prompt, good faith effort. I find criterion E. against the Applicant.

The Government has established its case under Criteria J. The Applicant's knowing falsification to an agency of the federal government on matters within that agency's jurisdiction clearly violate 18 U.S.C. §1001. The falsifications had the potential to influence the course of the background investigation in areas of legitimate concern to the Government.

### **FORMAL FINDINGS**

Paragraph 1. Criterion H: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Paragraph 2. Criterion E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Paragraph 3. Criterion J: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).
2. Applicant's counsel suggests that the hearing process is unfair to Applicant because the Government did not produce the persons who reported Applicant's alleged drug use as witnesses at the hearing. This claim is without merit. The record clearly reflects that the SOR is based entirely on information provided by the Applicant to the DIS during two subject interviews, and that Applicant had the opportunity to cross-examine the agents involved in the second interview--the only interview involving contested issues. The information which initially motivated the DIS to conduct the first interview--which apparently came from non-governmental sources--is officially irrelevant to this proceeding, except that it provide a good-faith basis for the DIS to interview Applicant. Indeed, to ensure fairness to Applicant's in security clearance investigations, Government regulations require that, wherever possible, the Government confront Applicants with alleged misconduct to provide Applicants the opportunity to respond.
3. "I was questioned regarding drug involvement. From about 1985 to 1987 I did use marijuana. I used marijuana in social settings when a marijuana cigarette would be passed around. I would take a few drags and it would make me hungry. I tried the marijuana two or three times a year only at these parties and it was always available at no cost to me. I never participated in the production or trafficking (sic) of any illegal drug. I tried it out of curiosity and continued for a

time because it was there and to (sic) along. I stopped because I left that circle of friendship and did not have a need for the marijuana use. . . . I have not used any other drugs nor have I used marijuana since 1987. I do not associate with individuals that are involved with drugs. I can not (sic) explain why anyone would say or think that I have used drugs other than what I have explained."

4. I have carefully considered Applicant's assertion that the DIS agent suggested the date of last usage and find that assertion not credible. First, the assertion is contrary to the plain language of Applicant's sworn statement--a statement he reviewed and independently confirmed at the time he executed it. Second, I find the agent's testimony (Tr. 21) about how Applicant described the circumstances of his last use and how he narrowed down the date of last use to be more credible than Applicant's contrary claims.

5. I have also carefully considered Applicant's claims (Tr. 71-72) that 1) he took the pipe which was passed to him (believing it to be marijuana), 2) discovered it was not marijuana but some substance unknown to him, and 3) the agent suggested it was crack cocaine. I find more credible the agent's testimony (Tr. 22) that Applicant told her he smoked crack cocaine at the New Year's party.

6. I reject Applicant's intimation during the course of the hearing that this second statement was the product of coercion or other untoward circumstances. Although Applicant now claims that he was in pain during the interview, there is no record evidence to suggest he conveyed that to the interviewing agent. Applicant presented no outward symptoms suggesting he should not be interviewed (Tr. 35). Further, Applicant testified that all the questions and answers were voluntary (Tr. 60). I conclude from the record that Applicant made knowing admissions during the course of the interview, participated in reducing those admissions to a written statement, reviewed the statement, and acknowledged its accuracy before swearing to the statement.